Nos. 11,519 and 11,880

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

ARROW STEVEDORING COMPANY (a corporation),
Appellee.

UNITED STATES OF AMERICA,
Appellant,

vs.

ARROW STEVEDORING COMPANY (a corporation),
Appellee.

On Appeals from the District Court of the United States for the Northern District of California, Southern Division.

APPELLEE'S PETITION FOR A REHEARING.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Appellee respectfully petitions the Court for a rehearing upon the following grounds:

The Court in its decisions with respect to each of the above entitled cases committed error, as a matter of law, in the following respects:

(1) The Findings of Fact and Conclusions of Law of the District Court holding the Government liable on the basis of its sole fault were not appealed from and are therefore final and binding on the Government, and this Court is consequently without jurisdiction or power to disturb or set them aside.

(2) The decisions are based on the faulty legal conclusion that liability for damages fastens on the ship in the complete absence of its fault or negligence and merely because of the existence of unseaworthiness, which has no causal connection and is unrelated to the accident.

(3) The Court has further erred in holding that "unseaworthiness" of the vessel was created by the stevedores because of their "conscious *use* of the ship's hatch cover with knowledge of its defect" and in such a dangerous manner as to cause the accident and that therefore the Government, as vessel owner, is liable to the injured longshoremen by reason of such purported unseaworthiness.

(4) There is further error in the Court's finding that under the stevedoring contract Arrow had any liability to the Government for injuries resulting solely and proximately from Arrow's negligence.

There is no question that the Court found that the sole proximate cause of the accident was the negligence of Arrow. See this Court's opinion in the *Williams* case (No. 11,519) at page 5, as follows:

"On the facts *we find that the sole proximate cause of the injury to Williams was the negligence of Arrow* in its use of the door with knowledge of its defects of dogs and pins. The Governmen in no way participated in the wrongful use of the door, which otherwise could have been made secure in the usual manner described by Arrow's Larsen. *Seaboard Stevedoring Co. v. Sagadahoc S.S. Co.,* 32 F. (2d) 886 (Cir. 9); *Bethlehem Shipbuilding Corp. v. Joseph Gutradt Co.,* 10 F. (2d) 769, 771 (Cir. 9); *The Mars,* 9 F. (2d) 183, 184 Learned Hand, D. J." (Emphasis added.)

And similarly in the *Mitchell* case (No. 11,880) at Page 4:

"We hold that the *sole proximate cause* of Mitchell's death was the negligence if not recklessness of Arrow's working of the men in the known dangerous condition there existing." (Emphasis added.)

I.

THE GOVERNMENT'S RIGHT TO RECOUPMENT MUST BE BASED SOLELY UPON THE FINDINGS AND DECREE IN FAVOR OF THE LONGSHOREMEN WHICH BECAME FINAL IN THE DISTRICT COURT, NO APPEAL HAVING BEEN TAKEN.

As this Court has seen fit to make new and different Findings of Fact contrary to its often repeated rule against doing so (see the authorities listed by Judge Fee on Pages 6 and 7 of the Dissenting Opinion in the case of *Menafee v. Chamberlin,* No. 12124, decided June 23, 1949), a new point is raised which was not previously presented.

The Government cannot be solely at fault for the accident as to one party litigant, and wholly without fault for the same accident as to the other party litigant, in the same cause of libel.

The Government was under no particular requirement or duty to implead the Arrow Stevedoring Company in the original cause of libel but could, in the event of its being held liable, have elected to proceed independently against Arrow in a later recoupment or holdover action. Had this course been followed, the basis for the Government's recoupment would of necessity be the Findings of Fact and Conclusions of Law in the cause of libel against the United States by the libelants. Such a recoupment attempt would, unquestionably, have failed because the Government would have been bound by the Findings of Fact and Conclusions of Law which held and found the Government to be solely at fault in the original cause of libel. Admiralty Rule 56 does not enlarge on any of the Government's rights of recoupment as aforesaid. The rule merely provides a simple method for the avoiding of a multiplicity of suits. It permits a single forum for one adjudication as to all of the parties involved and in no way changes or enlarges the substantive law. As the record now stands, the Government is not entitled to seek or claim recoupment on any basis other than that pursuant to which its liability to the injured was originally established and that basis, because of the Government's failure to take an appeal, is now final and *res adjudicata,* and this Court is without jurisdiction to examine or amend the Find-

ings of Fact and Conclusions of Law which established the Government's primary responsibility. The basis of recoupment to which the Government is limited is therefore one involving its sole fault. As the record now stands, the liability for which the Government is seeking to recoup from Arrow is the wrong which the Government committed as the result of its sole fault. This Court, by the contrary conclusions thus presented, has left the parties to this single action in the following position:

(a) *As to the longshoremen*: The Government is solely to blame for the accident and Arrow is entirely free from fault.

(b) *As to Arrow:* The Government, on the same facts and the identical record, is nowise to blame for the same accident and the sole fault is Arrow's.

Thus we have two opposed and completely antagonistic results in the same cause of libel involving the same parties and the same facts. In short, as to the prevailing libelants the Government has been held solely at fault as a matter of final record, which conclusion, as stated, cannot be disturbed by this Court since it is without jurisdiction to review it. As to Arrow, the Government has now been held blameless and Arrow fully at fault. This preposterous situation is brought about not through any act of Arrow but by the deliberate act of the Government in not perfecting an appeal or complaining of the trial Court's Findings of Fact and Conclusions of Law holding it fully at fault. By this failure to complain or object to the charging allegations of the libelants and Findings of

Fact and Conclusions of Law thereon, the Government has permitted them to become final and consequently has consented and agreed thereto. The Government's agreement is now irrevocable, and it is estopped to attack the lower Court's findings and decree, and it can only seek recoupment from Arrow on the basis for which it was originally held liable, viz., its sole fault.

II.

A VESSEL OWNER CANNOT BE SADDLED WITH LIABILITY FOR INJURY TO AN EMPLOYEE OF AN INDEPENDENT CONTRACTOR WHOSE NEGLIGENCE IS THE SOLE PROXIMATE CAUSE OF THE INJURY.

This Court has committed grave error in holding that the Government, as the vessel owner, was in any respect liable to the injured men for the consequences of the accident, in view of its findings that the "sole proximate cause" of the occurrence was the "negligence" of Arrow.

We respectfully submit that Government counsel have woefully mislead the Court by their faulty interpretation of the United States Supreme Court's decision in the case of *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 90 L. Ed. 1099 and have misapplied the legal significance of this Court's opinion in the case of *Seaboard Stevedoring Corp. v. Sagadahoc SS Co.,* 32 Fed. (2d), 886 (Cir. 9).

It is true that in the *Sieracki* case the United States Supreme Court did observe that unseaworthiness "is

essentially a species of liability without fault" and that "it is a form of absolute duty owing to all within the range of its humanitarian policy." Sieracki's injuries occurred while he was employed as a winch driver for an independent stevedoring company aboard a vessel owned and operated by Seas Shipping Co., when a shackle supporting a boom broke causing the boom and tackle to fall and strike him. He sued Seas Shipping Co. and two other companies which had built the vessel. The Court held that the remedy for injuries *proximately caused* by unseaworthiness, which has always been available to members of a crew of a vessel, was also available to a longshoreman employed by a third party such as in Sieracki's case.

But here is the vital difference between the facts involved in the *Sieracki* case and those in the cases at bar: Sieracki's injuries were *solely and proximately* caused by the vessel's *unseaworthiness,* which unseaworthiness was created by a concern other than the employer of the injured longshoreman. The accident in the present proceedings was found by the Court to have been *solely and proximately caused by the negligence of Arrow,* the employer of the men injured, and any so-called "unseaworthiness", as suggested in this Court's opinion, was immediately and directly created by the longshoremen themselves. We submit that in the latter circumstances the Government cannot be held liable to the injured longshoremen and that the *Sieracki* case does not support such holding. That case decides that the vessel owner is liable for injuries proximately caused by any unseaworthiness of the vessel,

even though the owner may not have been negligent in creating such unseaworthiness. Liability is fastened upon the shipowner for its breach of warranty. Sieracki was allowed to recover from the vessel owner because a faulty condition of the ship proximately caused his injuries. In the matters at bar the Court holds that *"the sole proximate cause of the accident was the negligence of Arrow," the employer of the injured men.* The Government, as vessel owner, could therefore not be liable upon any conceivable legal basis because the accident, according to the Court's findings, was not caused by any negligence on the part of the Government or any defective or unseaworthy condition of its vessel, other than that actively created by the longshoremen themselves.

In addition to the foregoing, the *Sieracki* case is not in point for another important reason in that the Supreme Court qualified its opinion to exclude therefrom this exact type of case. At page 95 the Court states:

> "The latter (stevedore employer) ordinarily has neither right nor opportunity to discover or remove the cause of the peril and it is doubtful, therefore, that he owes to his employees, with respect to these hazards, the employer's ordinary duty to furnish a safe place to work, unless perhaps in cases where the perils are obvious *or his own action creates them."* (Emphasis supplied).

This Court has found, as we have pointed out elsewhere, that the perils and negligence involved were the sole proximate cause of Arrow's negligence, thusly

bringing them clearly within the foregoing exception of "cause" created by its (Arrow's) "own action".

In admiralty it is fundamental that a vessel owner is not liable for injuries to an employee of a third party in the absence of a showing that unseaworthiness of the vessel resulting from a faulty condition *proximately caused* such injuries. See *Desiano v. United States of America,* 1946, A.M.C. 544 and *Shelton et al. v. Seas Shipping Company,* 1947 A.M.C. 1528 where the injured longshoremen failed in suits against the respective vessel owners because of lack of proof that their injuries were proximately caused by alleged unseaworthiness. As stated in Robinson on Admiralty, on page 305:

> "That the ship merely is unseaworthy does not avail the seaman, however. The injury must be due to unseaworthiness in respect to the thing from which injury results."

See also *La Guerra v. Brasileiro,* 1941, A.M.C. 1376, 39 Fed. Supp. 668.

We know of no existing precedent for the remarkable fiction which was urged by the Government and adopted by this Court that "negligent *use*" of a vessel's appliance by longshoremen employed by an independent contractor results in "unseaworthiness" of the ship for which the owner can be held liable in the event of injuries sustained by fellow employees of the stevedoring company whose negligence was the sole proximate cause of the accident. Taking all of the authorities from *The Osceola,* 189 U.S. 159, 23 S. Ct.

483, 47 L. Ed. 760, down to the aforementioned case of *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 90 L. Ed. 1099, we do not find a single decision which supports this ill-advised and erroneous contention.

If this Court's holding in the present cases were to remain in effect, it is inconceivable that there would ever be a situation where longshoremen are injured through their own negligent use of the vessel's equipment that they would not be able to sue the vessel on the basis of unseaworthiness as defined by this Court.

Assume that a stevedoring firm is employed by the vessel to discharge cargo. The shipowner turns over its vessel and her appliances to the stevedore. One of the longshoremen in operating the vessel's winch allows excessive slack to accumulate which catches underneath a sling load as it is being hoisted out of the hatch causing the load to be precipitated into the hold with the result that several of his fellow employees are injured. There can be no question that the negligent operation of the winch by the longshoreman winch driver created an "unsafe place to work" for his fellow employees, and it is likewise clear that this manner of doing the work would be a dangerous and reckless practice and that the sole proximate cause of the accident would be the winch driver's "negligent *use*" of the ship's appliances. Can it be rationally contended that the vessel was thereby made "unseaworthy" and that the injured longshoremen could therefore recover against the vessel?

Taking another example, assume that the longshoremen in discharging cargo from the hatch fail to remove a sufficient number of hatch boards or sections of the hatch to permit the work to be done with a reasonable degree of safety and that as the sole result of their own carelessness and recklessness the load strikes and dislodges some of the hatch boards which are precipitated into the hold striking and injuring some of their fellow longshoremen. Under these facts a trial Court would be compelled to find in favor of the injured longshoremen *against the vessel* even though the vessel owner had no knowledge of nor any participation in the longshoremen's actions.

Many such examples could be enumerated and in every instance the same absurd result would obtain. In every such case the vessel owner would be required to respond for damages solely and proximately caused by the negligence of the longshoremen.

At the risk of being thought repetitious and only because the point is one of such great importance to the shipping industry as a whole, we are under compulsion to point out that in practical use and application, if ship's gear is properly handled and used by the longshoremen's accidents and injuries do not result. When the gear is mishandled or misused by the longshoremen, injuries to fellow employees result and it therefore follows under the pronouncement of this Court that for every injury suffered as a result of the *use* by longshoremen of vessel's equipment or gear, no matter how good and seaworthy it may be when

turned over to them, recovery can be had against the vessel. There will be no exceptions to this startling rule.

The case of *Gonzales v. SS Belos,* 1939 A.M.C. 324, involves facts similar to those in the cases at bar. The libelant was an employee of Jarka Corporation, an independent stevedoring company, and was injured while discharging cargo from the hold of the steamship "Belos". He sued the ship and the Court held as follows:

> "I have considered the merits and believe that counsel for claimant-respondent is correct in his contention that the ship would not be liable, for the reason that if libellant was injured by negligence, it was the negligence of the foreman and coworkers of libellant that brought about the accident and was the proximate cause thereof. *Aden Maru,* 51 F. (2d) 599; *Daisy,* 282 Fed. 261-262.
>
> "Libellant was injured by certain bales of wood pulp, which he and a number of other co-workers were engaged in discharging from the hold of the ship, falling upon him. The foreman of the stevedores knew of this condition which developed as the bales were being moved, and there is also evidence that he gave instructions which were intended to remedy the condition. Apparently these instructions were not carried out."

It is quite evident from the foregoing facts in the *Belos* case, that an unsafe place to work was created by the longshoremen themselves. (Under this Court's decision an "unseaworthy" condition was thus created.) But this was not held to be "unseaworthiness"

of the vessel for which the vessel owner could be held liable.

In the *Aden Maru* case, above cited, an injured longshoreman, employed by an independent stevedoring company, sought to hold the vessel liable for injuries sustained on the theory that the vessel's winch was defective and that "the ship failed and refused to furnish bolts for the beam" of the hatch in question. The Court held:

> "In a case of this kind, where the employer (stevedoring company) was unquestionably negligent in the way the work was performed, and where, nearly a year after the injury occurred, for the first time, claim is made that the ship caused the injury, libelants should be prepared, not merely to suggest that the ship may have been negligent, and that its negligence may have been the proximate cause of the injury, but to clearly and satisfactorily establish that it was negligent, and that that negligence was a proximate cause.
>
> "* * * assuming without deciding that the ship failed and refused to furnish bolts for the beam it is entirely plain that everyone, including Culver, knew that the beam was not bolted; and assuming in the same way that in the particulars of leaking steam and the absence of a brake the winch was defective, and that the failure to have the winch in better condition was negligence, it is entirely clear *that neither the absence of bolts, nor the condition of the winch, was the proximate cause of the injury. This occurred solely and entirely as the proximate result of the generally reckless manner in which a dangerous piece of work was being performed* by attempting to drag

the bale up across the beam knowing that it was bound to foul it unless some one pushed it off, instead of topping the boom for a complete clearance." (Emphasis added.)

After carefully considering the above facts the Court then held as follows:

"Reduced to its simplest terms, this is a case in which a serious injury has resulted on shipboard to an employee of an independently contracting stevedore in the course of a culpably negligent and dangerous method of performing work voluntarily adopted by the employer and voluntarily participated in by the employee.

"In such a case, in order to hold the ship, it must be clearly established, both that it was negligent, and that its negligence was a proximate cause of the injury. In such a case, where the evidence leaves the matter of proximate cause in doubt, it defeats the cause of action. *Reading Co. v. Boyer* (C.C.A.) 6 F. (2d) 185; *Luckenbach v. Buzynski* (C. C. A.) 19 F. (2d) 871. Where, as here, proximate cause is clearly shown to be the negligence, not of the ship, but of the employer, it is plainer still that the case against the ship must fail. *Johns-Manville v. Pocker* (C.C.A.) 26 F. (2d) 204."

Here again is a clear example of injury having been sustained by a longshoreman as the direct and proximate result of the negligence of his employer. The Court did not stretch the term "unseaworthiness" to fit a situation where the stevedore company's act of negligence created the unsafe place to work which

proximately caused injury to one of its employees. As illustrated by the facts in the case under discussion, the longshoremen themselves created "an unsafe place to work", and in that sense, the vessel would be "unseaworthy" if this Court's startling pronouncement is not corrected. Neither the *Sieracki* case nor any other authority justifies any such holding. In this connection we again direct the Court's attention to the well considered opinion in the case of *La Guerra v. Brasileiro, supra.*

We believe we have adequately distinguished the facts in the *Sieracki* case, where injuries to a longshoreman were *proximately caused* by an unseaworthy condition created by an agency other than the longshoreman's employer, and the situation here where the sole proximate cause of the injuries was the negligence of the employer of the injured men.

We shall now differentiate this Court's holding in *Seaboard Stevedoring Corp. v. Sagadahoc SS Co.,* 32 Fed (2d) 886 (Cir. 9). The facts in that case are entirely different from the facts involved here, and that decision is not at all applicable. There the unseaworthy condition which proximately caused the accident was created not by the employer of the injured longshoreman but by the Seaboard Stevedoring Corp. which had loaded the vessel in another port. Its employees had not properly replaced the vessel's hatch covers. The injured man was employed by another stevedoring company in a later port of call, and in the course of his employment suffered injuries because of the improperly placed hatch boards. He sued the ves-

sel and, upon proof that the injuries were proximately caused by the unseaworthy condition resulting from the improperly placed hatch boards, he recovered. The vessel owner then sued Seaboard Stevedoring Corp. and obtained recoupment of the amount of the judgment, upon proving that the vessel's unseaworthiness was caused by Seaboard. Recovery against the SS "Sagadahoc" by the injured employee of the second stevedoring company was, of course, properly allowed because the unseaworthy condition of the vessel was shown to be the *proximate cause* of his injuries. Such is not the case here where the Government contends, and the Court finds, that the *sole proximate cause* of this accident was the negligence of Arrow, the employer of the men injured.

A case strongly relied upon by the Government is *Portel v. United States of America and Zalud Marine Corporation,* 1949 A.M.C. 487. An injured ship repair worker was allowed a recovery against respondent United States, as the vessel owner, because he was able to prove that one of the proximate causes of his injury was the failure of the ship's crew to open drains in the steam lines or to inform employees of the ship repair company as to whether or not the steam lines had been drained although they knew that the ship repair men were to perform work on the valves of the steam lines. The other proximate cause was held to be the negligence of the foremen of the ship repair company in ordering the libelant to work without making any inquiries as to whether steam pressure was in the lines. Consequently, the Court

held that libelant was entitled to recover from respondent United States, and that while libelant could not recover directly against his employer, the impleaded respondent (the ship repair company), the respondent United States was entitled to partial recoupment from the impleaded respondent because of the negligence of its foremen as aforesaid.

As we have already pointed out, the *Sieracki* case involved an injury *proximately caused* by a faulty shackle and there was no negligence on the part of the employer of Sieracki.

In order to permit recovery against the impleaded respondent, it must first be established that there is a direct liability on the part of the shipowner to the injured stevedore. If, as we have here shown, no legal liability exists as between the libelant and the Government, the question of any right it may have under admiralty principles to contribution from Arrow, is moot. This brings us to a consideration of the only possible liability that Arrow could have under the facts of these cases as found by this Court: the question of its contractual liability to the Government.

III.

SHOULD THE COURT HOLD THAT ARROW'S NEGLIGENCE AND THE VESSEL'S UNSEAWORTHINESS WERE BOTH PROXIMATE CAUSES OF THE ACCIDENT, ARROW IS RELIEVED OF LIABILITY BY REASON OF SPECIFIC LIMITATIONS IN THE STEVEDORING CONTRACT.

The position taken by the Government's counsel has placed them in a dilemma from which they cannot escape. The Court must choose between one of two position is—it cannot maintain both:

(1) The accident was solely and proximately caused by the negligence of Arrow, in which case the Government cannot sustain any "loss or damage", under the contract or otherwise, or

(2) The defective and unseaworthy hatch cover was a proximate cause of the accident, in which event the limiting provision of the contract providing that Arrow shall not be liable where "such loss or damage" is occasioned by a defective condition of the vessel or its gear, applies.

In either case Arrow is not liable. The first proposition we have fully covered heretofore. As to the second alternative the contract clearly expresses the intention of the parties. Section (b) of the contract provides that Arrow shall be liable to the Government for any "loss or damage" sustained by the Government as a result of Arrow's negligence. This section, however, expresses a manifest intention to be limited in its application, since it concludes as follows:

> "* * * subject, however, to the following limitations and conditions:"

The pertinent limiting language is contained as follows in Subsection 2:

> "* * * Nor shall the contractor (Arrow) be so responsible for any *such* loss or damage resulting from default of ships or other gear supplied by the Government."

We have emphasized the word "such" because we believe it demonstrates the obviousness and clear application of the limitation. The only possible significance to be attached to the words "such loss or damage" is that reference is thereby patently made directly to the words "any loss or damage" which are contained in Section (b). It is therefore crystal clear that under the contract Arrow is not liable to the Government for "any loss or damage which may be sustained by the Government as a result of the negligence" of Arrow, in the event that "any such loss or damage" results from a default of the ship or its gear.

We reiterate that the Court cannot properly hold that mere negligent *use* by Arrow's employees of the appliances of the Government's vessel can be said to produce "unseaworthiness", in the sense that the Government would be liable to the employees of Arrow injured as the sole proximate result of such negligent use. The unseaworthiness, if any, existing here was the unseaworthy condition resulting from the defective hatch door. This Court, however, by a process of incredible reasoning has exonerated this defect as a proximate cause of the accident. In other words, we

insist that a nice distinction cannot be made between unseaworthiness by reason of a defective hatch cover and unseaworthiness resulting from an unsafe place to work by reason of Arrow's negligent use of said hatch door. If there was any unseaworthiness, it had to stem from the defective hatch door, and in that case the limiting provision of the contract, providing that Arrow shall not be "so responsible for any such loss or damage resulting from default of ships or other gear supplied by the Government", is clearly applicable. Accordingly, Arrow cannot be held liable to the Government under the contract, or otherwise.

CONCLUSION.

For reasons heretofore set forth, it is respectfully submitted that the decisions in each of the above matters are clearly erroneous and contrary to law and that therefore the decisions should be reversed.

In view of the Court's radical departure from all preexisting concepts of admiralty law with regard to claimed liability of a vessel owner for injuries solely and proximately caused by the negligence of the employer of the men injured, and because of the extreme importance of the Court's ruling to all firms engaged in stevedoring activities, ship repair work and related maritime operations, if this petition does not satisfy this Court that it has committed grave error, it is respectfully requested that the matter be

set down for further oral argument in order that the Court may have the advantage of a full and complete discussion of our contentions.

Dated, San Francisco, California,
July 20, 1949.

Respectfully submitted,
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CERTIFICATE OF COUNSEL.

We hereby certify that the foregoing Petition for a Rehearing, in our judgment, is well founded and is not interposed for delay.

Dated, San Francisco, California,
July 20, 1949.

JOHN H. BLACK,
EDWARD R. KAY,
Proctors for Appellee and Petitioner, Arrow Stevedoring Company.